No. 78-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., NATIONAL FREIGHT CLAIM COUNCIL OF AMERICAN TRUCKING ASSOCIATIONS, INC., *Petitioners,*

v.

THE INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, *Respondents.*

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

Briefs in opposition to the petition for a writ of certiorari have been filed by the Department of Justice and the Drug and Toilet Preparation Traffic Conference. This reply brief is filed on behalf of the National Motor Freight Traffic Association, Inc. and National Freight Claim Council of American Trucking Associations, Inc.

REPLY ARGUMENT

Several arguments have been urged in opposition to the petition for a writ of certiorari. First, the Drug and Toilet Preparation Traffic Conference cites *United*

States v. *Fleisman,* 339 U.S. 349, 365 (1950), as support for its contention that petitioners cannot challenge the standard of review employed by the United States Court of Appeals for the District of Columbia Circuit.[1] The *Fleisman* case is easily distinguished. Here, petitioners' challenge is directed to the action of the Court of Appeals itself, namely, that the Court of Appeals applied an incorrect standard of review. This occurred when the Court of Appeals applied a "rational basis" standard of review citing its own decision in *Ethyl Corp.* v. *EPA,* 541 F.2d 1, at 34-35 (D.C.C.A. 1976). The question presented is, therefore, reviewable by this Court.[2]

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[1] This argument is not advanced by the government.

[2] See *Issue Not Raised—Supreme Court,* Ernest H. Schopler, 42 L.Ed.2d 946, 968 (1976):

"As ruled by the United States Supreme Court, the court will consider questions passed upon by the courts below, although not, or not properly, raised by the parties in the courts or administrative agency below. Mallett v North Carolina (1901) 181 US 589, 45 L Ed 1015, 21 S Ct 730; Missouri, K. & T. R. Co. v. Elliott (1902) 184 US 530, 46 L Ed 673, 22 S Ct 446; Mutual Life Ins. Co. v McGrew (1903) 188 US 291, 47 L Ed 480, 23 S Ct 375; Leigh v Green (1904) 193 US 79, 48 L Ed. 623, 24 S Ct. 390; Fullerton v Texas (1905) 196 US 192, 49 L Ed 443, 25 S Ct 221; Steigleder v McQuesten (1905) 198 US 141, 49 L Ed 986, 25 S Ct 616; Forbes v State Council of Virginia (1910) 216 US 396, 54 L Ed 534, 30 S Ct 295; Illinois C. R. Co. v Kentucky (1910) 218 US 551, 54 L Ed 1147, 31 S Ct 95; Kentucky Union Co. v Kentucky (1911) 219 US 140, 55 L Ed 137, 31 S Ct 171; Friend v Talcott (1913) 228 US 27, 57 L Ed 718, 33 S Ct 505; Consolidated Turnpike Co. v Norfolk & O. V. R. Co. (1913) 228 US 326, 57 L Ed 857, 33 S Ct 510, reh den 228 US 596, 57 L Ed 982, 33 S Ct 605; Bowe v Scott (1914) 233 US 658, 58 L Ed 1141, 34 S Ct 769; Manhattan Life Ins. Co. v Cohen (1914) 234 US 123, 58 L Ed 1245, 34 S Ct 874; Godchaux Co. v Estopinal (1919) 251 US 179, 64 L Ed 213, 40 S Ct 116; Cumberland Coal Co. v Board of Revision of Tax Assessments (1931) 284 US 23, 76 L Ed 146, 52 S Ct 48; Great N. R. Co. v Sunburst Oil & Refining Co. (1932) 287 US 358, 77 L Ed 360, 53 S Ct 145, 85 ALR 254; Nickey v Mississippi (1934) 292 US 393, 78 L Ed 1323, 54 S Ct 743; Herndon v Georgia (1935) 295 US 441, 79 L Ed 1530, 55 S Ct 794; Raley v Ohio (1959) 360 US 423, 3 L Ed 2d 1344, 79 S Ct 1257; Jones v United States (1960) 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233; Coleman v Alabama (1964) 377 US 129, 12 L Ed 2d 190, 84 S Ct 1152; Federal Power Com. v Sunray DX Oil Co. (1968) 391 US 9, 20 L Ed 2d 388, 88 S Ct 1526; Dyke v Taylor Implement Mfg. Co. (1968) 391 US 216, 20 L Ed 2d 538, 88 S Ct 1472; Sabbath v United States (1968) 391 US 585, 20 L Ed 2d 828, 88 S Ct 1755; Moragne v States Marine Lines, Inc. (1970) 398 US 375, 26 L Ed 2d 339, 90 S Ct 1772; Ocala Star-Banner Co. v Damron (1971) 401 US 295, 28 L Ed 2d 57, 91 S Ct 628; Pipefitters Local Union v United States (1972) 407 US 385, 33 L Ed 2d 11, 92 S Ct 2247; Ward v Monroeville (1972) 409 US 57, 34 L Ed 2d 267, 93 S Ct 80, 61 Ohio Ops 2d 292; Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750. See Boykin v Alabama (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709, infra § 17[b]."

Petitioners read the government's brief in opposition as accepting the proposition that the agency action under review here is not legislative action.[3] However, citing *FCC* v. *National Citizen Comm. for Broadcasting,* 436 U.S. 775, 803 (1978), and *Citizens of Overton Park* v. *Volpe,* 401 U.S. 402 (1971), the government argues that in this case the arbitrary and capricious standard in the Administrative Procedure Act, 5 U.S.C. § 702(2)(A), is the equivalent of the rational basis test applicable to legislative rulemaking used by the lower court, and that agency action "may be invalidated by a reviewing court under the 'arbitrary and capricious' standard if they are not rational and based on consideration of relevant factors." (Gov. Br., p. 5).

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[3] Intervenor, Drug & Toilet Preparation Traffic Conference, argues that the Commission exercised legislative authority (Intv. Br., p. 8), and therefore, properly applied the rational basis test as cited by the lower court in *Ethyl, supra,* at 34-35. Petitioners have previously addressed this point in their petition for a writ of certiorari and those arguments will not be repeated.

The government's argument points out the error in the lower court's standard of review. The nature of agency action being reviewed dictates what factors are relevant in determining whether the agency action lacks a rational basis. Petitioners submit that the factors to be considered by the Court in determining whether a legislative rule has a rational basis, that is, the test applied by the lower court, are not the same when determining whether an interpretative guideline has a rational basis. The rational basis test for legislative rules used by the lower court accords entirely too much deference to the agency action here under review. The proper standard of review is set forth in *Skidmore* v. *Swift Co.*, 523 U.S. 134 (1944), which standard should have been followed by the Court of Appeals.

The government attempts to distinguish *Skidmore* by arguing that here the Commission is interpreting its own order and that *Skidmore* involved an interpretation of a statute. First of all, the disputed phrase "for each article" interpreted by the Interstate Commerce Commission never appears in the Commission's order in MC-342 (Pet. App. 32a-34a). The disputed phrase appears in the tariff. As pointed out in the petition for a writ of certiorari, a tariff has the force and effect of a statute and courts can and do routinely interpret tariffs as statutes. Taken a step further, the tariff involved here determines the measure of damages and Congress has delegated exclusive jurisdiction to the Courts to award damages under 49 U.S.C. § 10730, formerly 49 U.S.C. § 20(11). Measure of damages is an equitable concept clearly beyond the expertise of the Interstate Commerce Commission.

Lastly, the government argues that whatever standard of review is articulated, the Commission decision cannot be characterized as arbitrary and capricious even if a lesser degree of deference is appropriate (Gov. Br., pp. 6-7). In making this argument the government attempts to distinguish this Court's interpretation of a released value provision in *Western Transit Co.* v. *Leslie & Co.*, 242 U.S. 448 (1917), and in doing so makes the same error made by the Commission and the Court of Appeals.

The statutory requirements that enable a carrier to limit its liability to something less than the actual value of goods is a two-step process. First, carriers must have reduced released value rates approved by the Commission. In this case the reduced released value rates are dependent on a declared value of "50 cents per pound" set forth in Item 60000. However, the carrier cannot limit its liability just because it has approved released value rates on file with the Commission. There is a second step. The shipper must agree in writing that its goods are being shipped at a released value, in this case 50 cents per pound as set forth in Item 60000. The election of the shipper to ship its goods at a released value of 50 cents per pound in exchange for a reduced rate is accomplished by following the instruction in Item 60002. Only Item 60002 contains the phrase "for each article." Neither the Commission nor the Court below has ever explained or even discussed why or how the phrase "for each article" used in the statutory written notification requirement in Item 60002 changes the undisputed meaning of the released value of "50 cents per pound" contained in Item 60000. Hence, for this reason alone, review under the proper standard would dictate a different result.

Wherefore, National Motor Freight Traffic Association, Inc. and National Freight Claim Council of the American Trucking Associations, Inc. request that a Writ of Certiorari be issued in this proceeding.

Respectfully submitted,

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